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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

AMY IMBURGIA et al., Plaintiffs and Appellants, v. DIRECTV, INC., Defendant and Respondent.	B284473 (Los Angeles County Super. Ct. No. BC398295)

APPEAL from an order of the Superior Court of Los Angeles County, Elihu M. Berle, Judge. Dismissed.

Milstein Jackson Fairchild & Wade, Mark A. Milstein, Mayo L. Makarczyk; Consumer Watchdog, Harvey Rosenfield, Pamela Pressley; Evans Law Firm, Inc., Ingrid Maria Evans; FEM Law Group, and F. Edie Mermelstein, for Plaintiff and Appellants Amy Imburgia and Kathy Greiner.

Kirkland & Ellis, Melissa D. Ingalls, and Robyn E. Bladow for Defendant and Respondent DirecTV, Inc.

Amy Imburgia and Kathy Greiner (appellants) are named plaintiffs in a class action suit against respondent DirecTV, Inc. (respondent) seeking, inter alia, damages and injunctive relief related to allegedly unlawful early termination fees respondent charges its customers. Respondent's customer agreement requires that all disputes be arbitrated, but does not allow for class-based or representative claims in such arbitrations. Because class action waivers were unenforceable in California before *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333 (*Concepcion*), the parties litigated their dispute for over two years, and the trial court certified a class. After *Concepcion*, respondent successfully moved to compel arbitration.

Appellants seek review of: (1) the order granting respondent's renewed motion to compel arbitration; and (2) a subsequent order denying appellants' motion for new trial on the issue of arbitrability. Appellants contend that both orders, although not final judgments, are appealable under the "death knell doctrine," because they effectively terminate all class claims. We disagree. The court did not decertify the class or dismiss class claims, but rather stayed the litigation pending the outcome of arbitration. Moreover, the trial court suggested that appellants might be able to pursue their public injunction claims in court after the arbitration stay is lifted, potentially as representatives of the still-certified class. Thus, the death knell has not sounded for all absent plaintiffs' claims. We therefore dismiss the appeal from both orders, and need not reach the merits of appellants' appeal.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Initial Litigation of Appellants' Claims Before the Trial Court*

In 2008, appellants sued respondent alleging the early cancellation fees the company collected from appellants and similarly-situated California consumers were unlawful under California's Consumer Legal Remedies Act (CLRA), False Advertising Law (FAL), Unfair Competition Law (UCL), and Civil Code section 1671, subdivision (d). Appellants sought money damages, restitution, disgorgement, attorney fees, declaratory relief, and injunctive relief. The desired injunctive relief included that respondent be ordered to cease charging any consumers in California early cancellation fees.

Appellants' customer agreement with respondent included FAA-governed arbitration provisions (the arbitration agreement), which cover this dispute. The arbitration agreement included a class waiver and private attorney general waiver, which provided that "[n]either you nor we shall be entitled to join or consolidate claims in arbitration by or against other individuals or entities, or arbitrate any claim as a representative member of a class or in a private attorney general capacity." At the time appellants filed their suit (and continuing until mid-2011), non-preempted California law deemed class action waivers unconscionable and unenforceable. (See *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 162–163 (*Discover Bank*).) Thus, the parties litigated in court for over two years without any party seeking to compel arbitration. On April 20, 2011, the court certified a class of "[a]ll California DirecTV customers who were charged by and/or paid to [d]efendant an ECP [early cancellation fee] from September 17, 2004." Approximately a week later, the

United States Supreme Court issued its decision in *Concepcion*, *supra*, 563 U.S. 333, which held that the Federal Arbitration Act (FAA) preempted California's *Discover Bank* rule, thereby rendering class action waivers in arbitration agreements enforceable. (See *id*. at p. 352.)

B. *Initial Motion to Compel and Related Appeals*

Soon after *Concepcion*, respondent moved to compel arbitration of appellants' individual claims and to decertify the class.

In opposing the motion to compel arbitration, appellants raised several arguments, including that respondent had waived its right to seek arbitration, and that appellants' claims under the CLRA, UCL, and FAL seeking public injunctive relief—that is, "relief that has 'the primary purpose and effect of' prohibiting unlawful acts that threaten future injury to the general public," rather than "redressing or preventing injury to an individual plaintiff" or class,[1] *McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945, 955 (*McGill*)—are inarbitrable under California law, and thus, that the court should sever those claims from anything compelled to arbitration. Finally, appellants argued that the arbitration agreement was unenforceable by its own terms under a non-severability clause that provided: "If . . . the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire [agreement] is unenforceable."

The court agreed with appellants that the arbitration agreement conflicted with California law, such that it was unenforceable under the non-severability clause. Specifically, the

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[1] Respondent does not dispute, and the trial court agreed, that appellants seek "public injunctions" under the CLRA and UCL.

court concluded that under California law, an arbitration agreement waiving a right to any "statutory representative actions," such as appellants' CLRA claims, was unenforceable in California, notwithstanding *Concepcion*. (See *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 502.) On this basis, the court denied the motions to compel arbitration and to decertify the class. The court therefore did not have occasion to address appellants' arguments that the court should exclude their public injunction causes of action from any order compelling arbitration, or that respondent had waived its right to arbitrate.

Respondent appealed the court's denial of its motion to compel arbitration, though not the denial of the motion to decertify. (See *Imburgia v. DirecTV* (2014) 225 Cal.App.4th 338, 340 (*Imburgia I*).) We affirmed the trial court's denial. (See *ibid.*) The United States Supreme Court granted review with respect to a single issue: Whether the "reference to state law in [the parties'] arbitration agreement . . . require[d] the application of state law preempted by the Federal Arbitration Act"—namely, California's *Discover Bank* rule holding the waiver of class claims unenforceable. (*DIRECTV, Inc. v. Imburgia* (2015) __ U.S. __ [136 S.Ct 463, 466] (No. 14-462), statement of question presented <https://www.supremecourt.gov/qp/14-00462qp.pdf>.) The Supreme Court construed "state law" to mean valid laws of the state—i.e., law *not* preempted by the FAA, which post-*Concepcion* did not include the *Discover Bank* rule—and accordingly concluded that this court "must 'enforc[e]' the arbitration agreement." (*Id.* at p. 471, quoting 9 U.S.C. § 2.) It remanded to this court for "further proceedings not inconsistent with [the Supreme Court's] opinion." (*Imburgia II, supra,* 136 S.Ct at p. 471.)

In the proceedings before this court that followed, the parties submitted additional briefing on the issue of whether DirecTV had

waived its right to seek arbitration. (*Imburgia v. DIRECTV, Inc.* (May 4, 2016, B239361) [nonpub. opn.] 2016 WL 2609764, at *2 (*Imburgia III*).) We rejected DirecTV's argument that the Supreme Court's opinion in *Imburgia II* precluded this or any other court from considering waiver arguments, because neither the Supreme Court opinion, nor the parties briefing to that court, addressed the issue. (*Ibid.*) Because the trial court had not yet had occasion to address this issue of fact, however, we further concluded that the trial court should " 'determine on remand whether waiver of the right to compel arbitration has in fact occurred.' " (*Ibid.*, quoting *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 984.) We therefore "remanded to the trial court for further proceedings not inconsistent with the United States Supreme Court's mandate and this court's opinion." (*Imburgia III, supra*, 2016 WL 2609764, at *2.)

C. *Respondent's Renewed Motion to Compel Arbitration and Appellants' Motion for a New Trial Regarding Arbitrability*

After remand, respondent filed a renewed motion to compel arbitration, and the parties submitted briefing on the issue of waiver. The trial court rejected appellants' waiver arguments. It explained that, because the arbitration agreement was not enforceable pre-*Concepcion*, respondent's failure to seek arbitration before that decision was not inconsistent with a desire to arbitrate. Accordingly, the court granted the motion to compel arbitration, and stayed the litigation pending arbitration. The court did not revisit its previous order granting certification, nor did it discuss any other arguments the parties had raised previously regarding the initial motion to compel.

After receiving written notice of the court's order on the renewed motion to compel arbitration in May 2017,[2] appellants also moved for a new trial on the arbitration issue or, in the alternative, for reconsideration of the motion to compel arbitration. The basis for appellants' motion was an April 2017 California Supreme Court decision *McGill, supra,* 2 Cal.5th 945, which held that "a provision in a predispute arbitration agreement that waives the right to seek [a public injunction under the CLRA, UCL, or FAL] in any forum . . . is contrary to California public policy and is thus unenforceable under California law."[3] (*Id.* at p. 952.) Appellants' motion for new trial argued that the arbitration agreement "effectively barred [appellants] from seeking a public

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[2] At the March 9, 2017 hearing on the renewed motion to compel arbitration, the trial court ruled from the bench and instructed respondent to give notice and prepare a written order. Respondent provided the proposed order, which the court signed on March 22, 2017. Respondent received notice of that order on May 18, 2017 and purports to base its new trial motion on that order.

[3] *McGill* further held that the FAA "does not . . . require enforcement of [such a] waiver provision." (*McGill, supra*, 2 Cal.5th at p. 952.) The United States District Court for the Southern District of California recently held otherwise, concluding that "the *McGill* rule . . . is preempted by the FAA," because it "would expressly prohibit parties from private streamlined bilateral arbitration seeking relief intended to redress only the plaintiff's claims, [and thus,] it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " (*McGovern v. U.S. Bank N.A.* (S.D. Cal., Jan. 25, 2019) __ F.Supp. __ [2019 WL 329537 at *9], quoting *Concepcion, supra*, 563 U.S. at p. 353.) As discussed *post*, however, we need not reach the parties' arguments regarding *McGill*.

injunction under the CLRA or UCL in any forum," since the agreement required arbitration of all claims between the parties, yet prohibited arbitration of class claims.

The court concluded it did not have jurisdiction to decide this issue, because it interpreted the scope of remand as permitting further proceedings solely on the issue of waiver.[4]

Appellants timely appealed both the trial court's order granting respondent's renewed motion to compel arbitration and its order denying appellants' motion for a new trial/reconsideration.

DISCUSSION

A. *Appealability of Order Granting Renewed Motion to Compel Arbitration*

An order granting a motion to compel arbitration is generally not appealable. (See *Garcia v. Superior Court* (2015) 236 Cal.App.4th 1138, 1149.) Under the "death knell" doctrine, however, orders that "effectively terminate class claims but permit individual claims to continue" may be appealed. (*In re Baycol Cases I and II* (2011) 51 Cal.4th 751, 754 & 759 (*Baycol*); see *Miranda v. Anderson Enterprises, Inc.* (2015) 241 Cal.App.4th 196, 201 (*Miranda*) [applying death knell doctrine to render an order compelling arbitration appealable].) Appellants argue that

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[4] The court further noted that, even if it had jurisdiction, both the new trial and reconsideration mechanisms were procedurally inappropriate. Specifically, the court explained that the motion to compel was neither a final judgment, from which a new trial could be taken, nor clearly a "death knell" order tantamount to a final judgment, and that the court also could not reconsider the public injunction/*McGill* issue, as the court had not previously considered it. Finally, the court suggested the motion was not timely filed, based on the circumstances surrounding the entry and service of the underlying order. (See p. 6, fn. 2, *ante*.)

this doctrine applies, as their right to seek relief on behalf of absent plaintiffs has "disappeared in its entirety" in the wake of the court's March 22, 2017 order. We disagree.

The rationale underlying the death knell doctrine is " ' "that without the incentive of a possible group recovery the individual plaintiff may find it economically imprudent to pursue his lawsuit to a final judgment and then seek appellate review of an adverse class determination," ' " thereby rendering the order " 'effectively immunized by circumstance from appellate review' " to the extent it dismisses class claims. (See *Miranda, supra*, 241 Cal.App.4th at p. 201, quoting *Baycol, supra*, 51 Cal.4th at p. 758.) Accordingly, "[a]ppealability under the death knell doctrine requires 'an order that (1) amounts to a de facto final judgment for absent plaintiffs, under circumstances where (2) the persistence of viable but perhaps de minimis individual plaintiff claims creates a risk no formal final judgment will ever be entered.' " (*Miranda, supra*, 241 Cal.App.4th at p. 200, italics omitted, quoting *Baycol, supra*, 51 Cal.4th at p. 759.)

A logical corollary to these requirements is that the death knell doctrine does not apply where an order terminates some, but not all, class claims. (See *Baycol, supra*, 51 Cal.4th at pp. 757–758.) "[O]rders that only limit the scope of a class or the number of claims available to it are not similarly tantamount to dismissal and do not qualify for immediate appeal under the death knell doctrine." (*Ibid.*)

Appellants bear the burden of establishing appealability. (See Cal. Rules of Court, rule 8.204(a)(2)(B).) In considering whether they have met this burden under the death knell doctrine, we need not decide conclusively whether specific class claims survive—only whether the door to litigating some or all of those claims in court remains open.

Such an open door exists here, because the trial court did not dismiss the class claims or decertify the class when it compelled arbitration, but instead generally stayed the litigation. (See *Aleman v. Airtouch Cellular* (2012) 209 Cal.App.4th 556, 566 & 586 [denial of motion for class certification without prejudice does not fall under death knell doctrine where trial court made clear the plaintiffs could renew their motion]; *Marenco v. DirecTV LLC* (2015) 233 Cal.App.4th 1409, 1415 (*Marenco*).) *Marceno* is instructive here. In that case, as here, the trial court compelled arbitration under an agreement containing a class arbitration waiver, but did not decertify the class or dismiss class claims. (See *ibid.*) The Court of Appeal concluded the second requirement of the death knell doctrine was present, because plaintiffs lacked financial incentives to pursue individual claims through arbitration and obtain a final appealable judgment. (See *ibid.*) But the appellate court nevertheless concluded that the "death knell" had not yet sounded for all absent plaintiffs' claims, given the continuing existence of a certified class in stayed litigation. (*Ibid.*) So too here.

In addition, the record reflects the trial court's view that some class claims might survive the court's order compelling arbitration. Specifically, the trial court suggested that appellants' CLRA, FAL, and UCL claims seeking public injunctive relief "might be stayed" while "other determinations at issue in the case may still go to arbitration, but other issues must be determined first before we come to such conclusions." As the class remains certified, it is possible appellants may pursue these claims on behalf of absent class members as well.

The possibility that these public injunction claims may "remain" bolsters our view that the court's order compelling arbitration "does not appear to constitute a de facto final judgment for absent plaintiffs." *(Young v. RemX, Inc.* (2016) 2 Cal.App.5th 630, 635; see *Elijahjuan v. Superior Court* (2012) 210 Cal.App.4th 15, 19 (*Elijahjuan*) [order not appealable as a "death knell" where "the court stayed litigation on the alleged violations of the Unfair Business Practices Act" and "therefore did not effectively terminate class claims"].) Although we cannot determine that—and express no opinion as to whether—appellants will be able to pursue their public injunction claims on a class-wide basis, this seems likely on the record before us and, when combined with the court's decision not to decertify the class or dismiss the class claims, is sufficient for us to conclude appellants have not met their burden.

Because the record does not support that the death knell has sounded for all representative claims, the purported appeal taken from the interlocutory order compelling arbitration must be dismissed. (See *Muao v. Grosvenor Properties, Ltd.* (2002) 99 Cal.App.4th 1085, 1088–1089.)

B. *Appealability of Order Denying Motion for New Trial*

A motion for new trial is not directly appealable, but is reviewable on appeal from the underlying judgment, to the extent that judgment is appealable. (See *Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 18–19; Code Civ. Proc., § 904.1, subd. (a)(2).) As discussed above, the order granting the renewed motion to compel arbitration is not a final judgment, nor should it be treated as such under the death knell doctrine. Thus, the court's order denying the motion for new trial is likewise not an appealable judgment.

C. *Discretionary Review of Purported Appeal as a Writ Petition*

Finally, in their reply brief, appellants request that, should we conclude the underlying orders are not appealable, we exercise our discretion to treat the purported appeal therefrom as a petition for writ of mandate. Arguably, appellants have waived such a request by failing to raise it in their opening papers. (*People v. Baniqued* (2000) 85 Cal.App.4th 13, 29 ["a point raised for the first time [in the reply brief] is deemed waived and will not be considered, unless good reason is shown for failure to present it before"].) In any event, the circumstances before us do not warrant our treating appellants' purported appeal as a writ petition, because dismissing the appeal and requiring the parties to proceed to a final judgment would not be " ' "unnecessarily dilatory and circuitous," ' " and would not leave appellants without an adequate remedy at law. (*Olson v. Cory* (1983) 35 Cal.3d 390, 401; cf. *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, 1097–1098 [treating putative appeal from order compelling arbitration as a writ because failure to do so would allow the issue on appeal to "effectively evade appellate review, establishing the lack of an adequate remedy of law necessary for a writ"].)

Accordingly, appellants' purported appeal must be dismissed in its entirety, and we need not reach appellants' arguments on the merits.

DISPOSITION

The appeal is dismissed. Respondent shall recover its costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

WEINGART, J.*